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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

WINTER/GREENBAUM

Mailed: September 26, 2005

Opposition No. 91160752

GREAT EARTH COMPANIES, INC.

v.

INTIMATE BEAUTY CORPORATION

**Before Hohein, Rogers, and Zervas,
Administrative Trademark Judges**

By the Board:

Applicant, Intimate Beauty Corporation d/b/a Victoria's Secret Beauty, seeks to register the mark "GREAT BODY" for use in connection with various personal body care products.¹

¹ Application Serial No. 78284374 was filed on August 7, 2003 and seeks registration under Section 1(b) of the Trademark Act. The goods set forth therein are as follows: personal care products, namely, aftershave gels, aftershave lotion, antiperspirant, artificial nails, astringent for the face, astringent for the skin, bath beads, bath oil, bath salts, blush, body glitter, body mist, body oil, body scrub, body wash, bubble bath, cologne, cream for the body, cream for the cuticles, cream for the eyes, cream for the face, cream for the feet, cream for the hands, deodorants for personal use, essential oils for personal use, exfoliating preparations for the skin, eye gels, eye makeup pencils, eye masks, eye shadow, face highlighter, face masks, face mist, face scrub, non-medicated foot soaks, face toners, foundation, fragrant body splash, fragrant body mist, hair conditioner, hair dyes, hair glitter, hair highlighter, hair mascara, hair pomade, hair rinses, hair removing creams, hair shampoo, hair spray, hair straightener, hair styling gel, hair styling mousse, lotion for the body, lotion for the face, lotion for the feet, lotion for the hands, lip balm, lip gloss, lip liner, lip makeup pencils, lipstick, makeup for the body, makeup

Great Earth Companies, Inc. opposes registration on the grounds that applicant's mark, when used on the goods identified in the application, will cause a likelihood of confusion among consumers, in view of opposer's previously used and registered mark "GREAT BODY" for "dietary food supplements."²

In its answer, applicant denied the salient allegations in the notice of opposition and alleged, as putative affirmative defenses, that the goods on which it intends to use the mark are not related to opposer's goods, and that the channels of trade for the parties' respective goods are different because applicant only intends to sell its "GREAT BODY" personal care products in its "VICTORIA'S SECRET" retail stores, its mail order catalogs, and on-line at the "VICTORIA'S SECRET" website, located at <http://www.victoriassecret.com>.

for the face, makeup remover, mascara, massage cream, massage lotion, massage oil, nail polish, nail polish remover, nail stencils, non-medicated blemish stick, non-medicated cleanser for the face, non-medicated foot spray, non-medicated massage ointment, oil blotting sheets for the skin, perfume, powder for the body, powder for the face, powder for the feet, pumice stones for personal use, salt scrubs for the skin, shaving cream, shaving gels, shower cream, shower gel, skin bronzing cream, soap for the body, soap for the face, soap for the hands, sun block for the body, sun block for the face, suntan lotion for the body, suntan lotion for the face, sunless tanning lotion for the body, sunless tanning lotion for the face, pre-suntanning lotion for the body, pre-suntanning lotion for the face, post-suntanning lotion for the body, post-suntanning lotion for the face and talcum powder.

² Reg. No. 1333943, issued on May 7, 1985, claiming dates of first use anywhere and first use in commerce in February 1984. Sections 8 & 15 affidavits accepted and acknowledged.

This case now comes up on opposer's motion for summary judgment filed on September 30, 2004, on the issue of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d). The parties have fully briefed the issue,³ and we have considered opposer's reply brief. See Trademark Rule 2.127(a).

Standard of Review

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). A dispute as to a material fact is genuine only if a reasonable fact finder viewing the entire record could resolve the dispute in favor of the nonmoving party. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). In deciding a motion for summary judgment, the Board must view the evidence in the light most favorable to the nonmovant, and must draw all reasonable inferences from underlying facts in favor of the nonmovant. *Id.*

A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317

(1986), and *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). When the moving party's motion is supported by evidence sufficient to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific genuinely-disputed facts that must be resolved at trial.

The nonmoving party may not rest on the mere allegations of its pleadings and assertions of counsel, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine issue of material fact for trial. In general, to establish the existence of disputed facts requiring trial, the nonmoving party "must point to an evidentiary conflict created on the record at least by a counterstatement of facts set forth in detail in an affidavit by a knowledgeable affiant." *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 941, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990), citing *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836, 221 USPQ 561, 564 (Fed. Cir. 1984). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it would

³ The parties' stipulation (filed October 29, 2004) to extend the time for applicant to respond to the motion for summary judgment until December 2, 2004, is approved.

have the burden of proof at trial, judgment as a matter of law may be entered in favor of the moving party. Fed. R. Civ. P. 56(c). *Celotex Corp.*, 477 U.S. at 322-323.

Opposer's Evidence

In support of its motion for summary judgment, opposer argues that there is no genuine issue of material fact inasmuch as the marks are identical, the goods are closely related, and the channels of trade are identical. As evidence thereof, opposer submitted the following:

(1) a "Notice of Reliance"⁴ to which are attached USPTO TARR⁵ database printouts regarding opposer's pleaded registration for the mark "GREAT BODY,"⁶ opposer's assertedly related registrations for trademarks and service marks that contain the term "GREAT,"⁷ and third-party

⁴ Opposer did not need to submit the referenced materials under a notice of reliance in order to make them of record for present purposes. Rather, for purposes of a motion for summary judgment, the materials may be submitted as attachments or exhibits to a party's brief on the motion. See Trademark Rules 2.122(b), 2.122(d)(2), 2.122(e), 2.122(f), and 2.127(e)(2). TBMP § 528.05(a) (2d ed. rev. 2004).

⁵ Trademark Application and Registration Retrieval (TARR), <http://tarr.uspto.gov/>.

⁶ See *supra* note 2 regarding opposer's pleaded registration, Reg. No. 1333943.

⁷ Opposer's other registrations referenced in its "Notice of Reliance" that contain the term "GREAT" include the following: "GREAT EARTH" (Reg. No. 975801, issued January 1, 1974, claiming March 9, 1972 as its dates of first use anywhere and first use in commerce for "vitamin and mineral supplements," Sections 8 & 15 affidavits accepted and acknowledged; and Reg. No. 1206686, issued August 31, 1982, claiming dates of first use anywhere and first use in commerce in April 1971 for various nutritional supplement and body care products, Sections 8 & 15 affidavits

registrations that set forth the same or related goods as those referenced in opposer's pleaded registration and in the subject application;

(2) status and title copies⁸ of opposer's above-referenced pleaded and assertedly related registrations, which show that such registrations are subsisting and owned by opposer;

accepted and acknowledged); "GREAT EARTH" with Earth design (Reg. No. 1282027, issued on June 19, 1984, claiming January 10, 1976 as the dates of first use anywhere and first use in commerce, Sections 8 & 15 affidavits accepted and acknowledged); "GREAT EARTH" with stylized globe design (Reg. No. 1626545, issued on December 11, 1990, claiming dates of first use anywhere and first use in commerce in July 1989 for body and skin care products, and claiming dates of first use anywhere and first use in commerce in January 1989 for various dietary supplements and healthcare products, Sections 8 & 15 affidavits accepted and acknowledged); "GREAT SHAPE" (Reg. No. 1181818, issued on December 15, 1981, claiming June 17, 1980 as its dates of first use anywhere and first use in commerce, for a dietary supplement; Reg. No. 1598051, issued on May 29, 1990, claiming July 26, 1988 as its date of first use anywhere and August 18, 1988 as its date first use in commerce, for various body care preparations, and claiming June 17, 1980 as its dates of first use anywhere and in commerce for dietary and nutritional supplements and liquid meal replacements; and Reg. No. 2510624, issued on November 20, 2001, claiming dates of first use anywhere and first use in commerce in June, 2000 for magazines, newsletters and informational sheets in the fields of dietary supplements, health, nutrition, and the like); and "GREAT BREAKFAST" (Reg. No. 1644924, issued on May 21, 1991, claiming April 16, 1990 as its dates of first use anywhere and first use in commerce for dietary and nutritional supplements in the form of a drink mix).

⁸ The Board acknowledges receipt of the status and title copies of opposer's registrations, which were submitted on October 12, 2004, after opposer filed its motion for summary judgment. The Board prefers that an opposer, as the moving party, provide a status and title copy of its pleaded registration(s) with the notice of opposition under Trademark Rule 2.122(d)(1), or with the summary judgment motion. See TBMP § 528.05(d)(2d ed. rev. 2004). The Board discourages piecemeal submissions for summary judgment motions.

(3) declarations of Mel Rich, President of Phoenix Laboratories, Inc. ("Phoenix"), and Hallie Rich, a Phoenix employee, to which are attached numerous exhibits, including information downloaded from the Internet; and

(4) the declaration of Jay Geller, opposer's counsel.

In Mr. Rich's declaration, he states that Phoenix is related to opposer in that Phoenix and opposer are currently owned by the same parent entity, Evergood Products. He states further that Phoenix has continuously manufactured dietary supplements for opposer and its predecessor-in-interest, Great Earth International, Inc., since 1983. Attached to his declaration are, *inter alia*, printouts from several websites on the Internet, which are offered in support of opposer's contention that nutritional supplements and personal body care products have been advertised in connection with the same marks at the same websites on the Internet.

The declaration of Ms. Rich, which was submitted as an attachment to opposer's reply brief, comprises a series of statements documenting her Internet research on and telephone calls to various companies to confirm that they sell both cosmetics and supplements. Attached to the

declaration are exhibits of downloaded materials printed in connection with Ms. Rich's searches on the Internet.⁹

Internet Evidence

Applicant objects to the Internet evidence attached to Mr. Rich's declaration, arguing that this evidence is "improperly authenticated hearsay" under Fed. R. Evid. 801.¹⁰ In regard to the objection that the Internet evidence was not properly authenticated, we disagree with applicant's argument. See Fed. R. Civ. P. 56(e). Internet materials submitted *for purposes of summary judgment* may be authenticated by an affidavit or declaration of the person who accessed the information on the Internet and who can identify the materials, including the nature, source and date of the materials. See *Raccioppi v. Apogee, Inc.*, 47 USPQ2d 1368, 1371 (TTAB 1998)(personal knowledge of content is not required; only the source of the information must be within the personal knowledge of the declarant). See also TBMP §§ 528.05(b) and (e) (2d ed. rev. 2004). Mr. Rich's

⁹ Ms. Rich's declaration has little probative value inasmuch as she did not ask during her telephone calls whether any of the companies sell dietary supplements and cosmetic products under the same mark. Further, the Internet evidence attached thereto was largely repetitive of the evidence attached to the declaration of Mr. Rich and, thus, merits only limited consideration.

¹⁰ Applicant specifically alleged that the Internet materials are "improperly authenticated hearsay under Federal Rule of Evidence 801 as they are being offered by Mr. Rich for the truth of the assertion" contained therein, namely, that the sites depicted do actually sell the products displayed (see applicant's opposition to the motion for summary judgment, page 7, n.4).

declaration satisfies the requirements for authentication. To the extent that applicant objects to the Internet evidence as hearsay, the Board regards the Internet evidence for what it shows on its face, *i.e.* that the information was available to the public at the time the declarant accessed the Internet, and not as evidence of the truth of the statements made therein. For that reason, hearsay is not an issue with regard to the summary judgment motion. Instead, "the reliability of the information becomes a matter of weight or probative value" to be given to the proffered evidence by the Board. *Raccioppi*, 47 USPQ2d at 1371.

Priority

Inasmuch as opposer has pleaded a valid and subsisting registration for the mark "GREAT BODY," and has submitted a status and title copy thereof showing that the registration is currently subsisting and owned by opposer, priority is not an issue in this proceeding. *See King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).¹¹

¹¹ Mr. Geller's declaration includes a single exhibit that comprises segments of applicant's answers to opposer's first set of written interrogatories, and specifically highlights the interrogatory wherein opposer requested that applicant identify all products on which it has used the mark "GREAT BODY." Presumably, opposer submitted this evidence in support of its claim of priority and, specifically, in support of its contention that applicant has not commenced use of the mark "GREAT BODY" for any goods. Inasmuch as priority is not an issue in this proceeding, the Board need not address this evidence.

Likelihood of Confusion

As with any case in which likelihood of confusion is at issue, we analyze whether there exists a likelihood of confusion under the thirteen factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); and *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). However, while we have considered each factor for which we have evidence, we focus our analysis herein on the relevant *du Pont* factors in this proceeding, namely, the appearance of the marks, the related nature of the goods, and the similarity of trade channels. *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338, 57 USPQ2d 1557, 1559-1560 (Fed. Cir. 2001).

There is no dispute that the parties' marks, "GREAT BODY," are identical in appearance, sound, meaning and commercial impression. The identical nature of the marks weighs heavily against the applicant in the likelihood of confusion analysis. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566, 223 USPQ 1289, 1289-90 (Fed. Cir. 1984).

In regard to whether the parties' goods are related, it is well settled that when the marks at issue are identical, the relationship between the involved goods need not be as great or as close as in the situation where the marks are not identical or strikingly similar. *Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981). It is "only necessary that there be a viable relationship between the goods [...] in order to support a holding of likelihood of confusion." *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). See also *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989) ("the greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products"). Moreover, "the use of identical marks can lead to the assumption that there is a common source," even when goods are not competitive or intrinsically related. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1983).

The evidence of record establishes that there is more than merely a viable relationship between applicant's goods and the goods set forth in the cited registration, such that a reasonable consumer, when viewing the identical marks, would be confused as to the source or sponsorship of the goods. *Id.* In particular, opposer's registrations for the

marks "GREAT EARTH,"¹² "GREAT EARTH" (with Earth design)¹³ and "GREAT EARTH" (with stylized globe design)¹⁴ set forth goods that are the same as, or highly similar to, the goods identified in both the subject application and the pleaded registration, thus illustrating that consumers would expect the involved goods to be marketed under a single mark. In the same manner, the following third-party registrations¹⁵ also illustrate the related nature of the parties' goods:

- Reg. No. 2863532¹⁶ for the mark "SHANKARA", for *after-shave lotions, after-sun lotions, astringents for cosmetic purposes, bath beads, antiperspirants, essential oils for personal use, sun screen, sun tanning preparations*, and numerous other goods in International Class 3, which are set forth in the subject application; and for *dietary food supplements, nutritional supplements*, and vitamin and mineral supplements in International Class 5.
- Reg. No. 2771649¹⁷ for the mark "NATURE'S PICK" (and design) for *herbal skin soap*, in International Class 3, and *food supplements* in International Class 5.

¹² Reg. Nos. 975801 and 1206686, *supra* note 7.

¹³ Reg. No. 1282027, *supra* note 7.

¹⁴ Reg. No. 1626545, *supra* note 7.

¹⁵ Two of the nineteen third-party registrations referenced by opposer in its "Notice of Reliance" claim Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e), as a basis for registration, without any use in commerce. For that reason, those registrations were accorded little probative value by the Board. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

¹⁶ Reg. No. 2863532, issued on July 13, 2004.

¹⁷ Reg. No. 2771649, issued on October 7, 2003.

- Reg. No. 2850755¹⁸ for the mark "L" with "mortar and pestle" design, for a full line of cosmetics and cleaning preparations, including *bubble bath, shampoo, hair styling gels, sun screen preparations, and after-shave lotions* in International Class 3, all of which are set forth in the subject application; and for a full line of pharmaceuticals, including *dietary and nutritional supplements*, vitamin and mineral supplements and herbal supplements in International Class 5.
- Reg. Nos. 2713751¹⁹ and 2079465²⁰ for the mark "NATURAL MD" for, respectively, a full line of nonmedicated skin care, hair care and nail care preparations, including *after shave lotion, antiperspirants, suntanning creams and lotions, body and face soap, hair coloring creams and lotions*, and numerous other goods set forth in the subject application in International Class 3; and for *dietary supplements* in International Class 5.

Thus, the numerous registrations of opposer and the third-parties show that the goods listed therein, namely, various personal body care products and dietary and nutritional supplements, are of a type that may emanate from a single source in connection with the same mark. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Accordingly, we find that the parties' goods are highly related.

The evidence of record also shows that the channels of trade of the involved goods are highly similar, if not

¹⁸ Reg. No. 2850755, issued on June 8, 2004.

¹⁹ Reg. No. 2713751, issued on May 6, 2003.

²⁰ Reg. No. 2079465, issued on July 15, 1997, Sections 8 & 15 affidavits accepted and acknowledged.

identical. Specifically, the Internet evidence attached to Mr. Rich's declaration illustrates that personal body care products and nutritional supplements have been advertised in connection with the same trademarks, and that such goods have been available for on-line purchase at some of those same websites. For example, a portion of Exhibit E to Mr. Rich's declaration shows that at the website of the "Melaleuca Wellness Center" (at www.melaleuca.com), a potential purchaser could view numerous nutritional health supplements and body care products under the "Health" and "Body" categories of the website, and could select any of those products for purchase. Similarly, the segment of Exhibit E related to "Dr. Murad" products shows that a potential purchaser could review various skincare products and healthcare supplements offered at the website (at www.murad.com) and could purchase them using the website's "Catalog Quickorder" feature. In view of this and similar evidence attached to Mr. Rich's declaration, we find that the involved goods are not only related, but they also have highly similar, if not identical, channels of trade.

Applicant argues that opposer's evidence is *de minimus* and insufficient to show the absence of a genuine issue as to whether the parties' respective goods are related. However, in stark contrast to opposer's submission of evidence, applicant did not designate specific portions of

the record nor did it provide any evidence to show that there is a genuine factual issue as to whether the respective goods are related.²¹ In view of the extensive evidence provided by opposer, applicant's unsupported argument is unpersuasive. See *Octocom*, 918 F.2d at 941, 16 USPQ2d at 1786 (Court determined that applicant's argument was "without evidentiary foundation" and "no more than [applicant's] disagreement with the board's [sic] ultimate conclusion on the likelihood-of-confusion issue").

Applicant also argues that there is a genuine issue of material fact as to whether the channels of trade of the respective goods are different because its personal body care products will only be sold through its "VICTORIA'S SECRET" retail stores, website and catalog. Applicant's argument is not well taken. It is well settled that the determination of whether there is a likelihood of confusion must be based on the goods as they are identified in the involved application and pleaded registration. *Octocom*, 918 F.2d at 942, 16 USPQ2d at 1787. See also *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1463, 18 USPQ2d 1889, 1882 (Fed. Cir. 1991); and *Canadian Imperial Bank of*

²¹ As we discussed more fully on page 4 herein, the nonmoving party must point to an evidentiary conflict created in the record, and cannot rely on mere allegations to show that there is a genuine issue as to a material fact. See *Octocom*, 918 F.2d at 941, 16 USPQ2d at 1786.

Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Where there is no limitation on the channels of trade in the identification of goods in either the subject application or the pleaded registration, as in this proceeding, it is presumed that the identifications encompass all goods of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973); *Kalart Co. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). For these reasons, the mere allegation in applicant's answer and the contention in its brief in opposition to the motion for summary judgment that the channels of trade for its goods will be limited are insufficient to raise a genuine issue of material fact. Fed. R. Civ. P. 56(e). See *Octocom*, 918 F.2d at 941, 16 USPQ2d at 1786 (nonmoving party's response was not supported by contradictory facts). Given the unrestricted identification of goods in the involved application and lack of evidence from applicant to contradict the evidence provided by opposer,²² there is no basis for the Board to

²² Notably, applicant did not plead a defense under Section 18 of the Trademark Act, 15 U.S.C. § 1068, that there would be no likelihood of confusion if its identification were restricted, and applicant did not attempt to amend its application to limit the channels of trade of its goods.

find that a genuine issue of material fact exists as to channels of trade.

Upon careful consideration of the pleadings, the parties' arguments, the evidence submitted by opposer, and the absence of any evidence from applicant, and drawing all justifiable inferences in favor of applicant as the nonmoving party, we find that no genuine issue of material fact remains for trial, that opposer has established that there is likelihood of confusion between its mark and applicant's mark, and that opposer is entitled to judgment as a matter of law.

In view thereof, opposer's motion for summary judgment is **GRANTED**.

Accordingly, the opposition is sustained, and registration to applicant is refused.